

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

ORIGINAL AND AFFIDAVIT
OF MAILING

77-1389

To be argued by
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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1389

UNITED STATES OF AMERICA,

Appellee,

—against—

ALFRED FAYER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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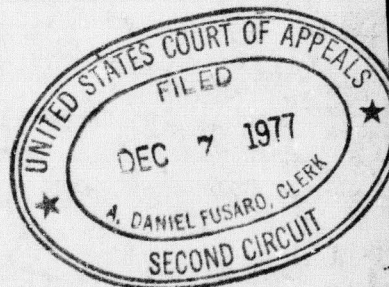


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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Appellant Alfred Fayer appeals from a judgment of conviction of the United States District Court for the Eastern District of New York (Mishler, *Ch. J.*) entered on August 19, 1977 after a jury trial. Appellant was convicted of all four charged counts of violating 18 U.S.C. § 1623, in that he knowingly made false material declarations before a court of the United States. More specifically, appellant was convicted of making false material declarations [hereinafter "perjury"] while testifying in his own behalf under oath in a non-jury trial (Weinstein, *J.*) held in February 1975, in which he was charged with obstruction of justice (18 U.S.C. § 1503) and bribery (18 U.S.C. § 201(d) and 2) concerning a conversation with a witness which took place in February 1972.

Appellant was sentenced to pay a fine of \$5000 on Count Four. Imposition of sentence was suspended on

Counts One, Two, and Three, with appellant being placed on probation for one month.

On this appeal appellant does not contest the sufficiency of the evidence. Appellant does, however, raise five issues: (1) that all four counts of the indictment should have been dismissed on grounds of collateral estoppel because the acquittal in the initial non-jury trial somehow bars the instant perjury prosecution; (2) that the admission into evidence of background testimony concerning incidents which did not directly involve appellant was reversible error; (3) that it was reversible error for the court to have allowed a government witness to testify as to what certain statements made by appellant and others meant to him; (4) that the conviction on Count Four should be reversed, because the prosecutor's summation in pointing out to the jury a word which could be heard on a tape recording of the conversation but which did not appear on the transcript somehow constituted a denial of the right to confrontation and an impermissible amendment to the indictment; and (5) that the conviction on Count Four should be reversed and the count dismissed because the false statement made by appellant was not material as a matter of law.

Statement of Facts

1. The obstruction of justice and bribery trial

A. Factual background

In 1971 a grand jury in the Eastern District of New York commenced an investigation into wide-ranging abuses by the real estate industry regarding Federal Housing Administration (hereinafter "FHA") programs and insured mortgages. This investigation revealed extensive bribery of FHA personnel by real estate and

mortgage lending firms (see, *e.g.*, JA. 182-187, 200-202, 240).¹ In the fall and winter of 1971, a number of employees of the FHA and Eastern Service Corporation (hereinafter "Eastern Service"), a mortgage lending institution licensed to do business with the FHA, were subpoenaed or requested to appear before this grand jury (JA. 182-187). The crux of the obstruction of justice and bribery trial involved efforts in February 1972 to persuade one witness, Edward Goodwin, not to testify before that grand jury.²

Goodwin was employed by the FHA as an appraiser. During the years 1967 through 1971 he received extensive illegal payments from Harry Bernstein, President of Eastern Service, and his wife, Rose Bernstein. The payments were made with intent to influence his official actions in connection with various FHA appraisals (JA. 200-201). In January, 1972, Goodwin agreed to cooperate with the Government (JA. 209). Thereafter, on three occasions, February 1, 8 and 9, 1972, Goodwin, who was equipped with an electronic recording device, met with Harry and Rose Bernstein to discuss the grand jury investigation (JA. 209-210, 228-231).

¹ "A" refers to Appellant's Appendix on this appeal from the perjury trial; "JA" refers to the Joint Appendix on the appeal from the prior trial, which has been made part of the record on this appeal; and "T" refers to the transcript of the perjury trial.

² In order to have the proper perspective on the instant appeal from the perjury trial, it is important to have a full overview of the obstruction of justice and bribery trial, as well as the critical meeting which took place on February 9, 1972 between Alfred Fayer, Harry Bernstein, Rose Bernstein, and Edward Goodwin. Hence the facts underlying the prior trial will be set forth at some length. The government's evidence in that trial (as well as the perjury trial) was largely based on the tape recording of that meeting, supplemented by the testimony of Goodwin. When referring to the transcript of the tape recording, we have cited to the appendix on the instant appeal rather than the Joint Appendix on the prior appeal.

As the tapes indicate, at the February 8th meeting Goodwin stated to Harry and Rose Bernstein that he had discussed this matter with his attorney, who raised the *possibility* of his cooperation with the government (A. 311, 312, 335, 342). The Bernsteins urgently advised Goodwin not to talk (A. 337, 340) and to exercise his Fifth Amendment privilege when subpoenaed before the grand jury (A. 339). They told Goodwin that they would provide him with a good criminal lawyer as they had done with many of their employees who had previously been subpoenaed before the grand jury (A. 298-299, 340). The next day, February 9, 1972, Goodwin met again with the Bernsteins. They proceeded to a restaurant in West Hempstead, New York. Also present was appellant (JA. 229-231).

Appellant, who had known the Bernsteins for thirty years, considered himself to be their close personal friend (JA. 112, 130, 131). In addition, he was the closing attorney and did general legal work for Eastern Service (see, e.g., A. 396, JA. 278), including helping to establish new branch offices in Florida and Atlanta (see, e.g., JA. 278, 279). He was also on the Board of Directors of the corporation (JA. 278; see also JA. 281, 284).

Appellant had been keeping his finger on the pulse of the government's investigation for the benefit of Eastern Service (JA. 293-294). He had offered to obtain and had, in fact, obtained counsel for various Eastern Service employees who were possible targets of the grand jury investigation. The Bernsteins were paying the attorneys' fees (A. 379, JA. 266, 287). Appellant had advised these employees to "sit tight" in connection with the grand jury investigation (A. 372):³

³ Unless otherwise indicated all statements attributed to appellant which are quoted herein are from the tape recordings of his conversations with Goodwin.

... everybody has to sit tight. This is what I've advised them; this is what everybody has done.

Appellant had also advised Rose Bernstein to "sit tight" before the grand jury, "no matter what they say" (A. 365). Appellant's advice to those persons to remain silent in connection with the grand jury investigation included the advice to claim the Fifth Amendment and refuse to testify when they were called before the grand jury (A. 376). His advice in this regard had been followed (A. 376):

... my advice is this to them. Refuse to testify. And this is what they did ... Each and every one of them. Everyone did the same thing! Refuse!

In giving this advice and coordinating the tactic of a collective refusal to testify, appellant admittedly was concerned with protecting Eastern Service and the Bernsteins (JA. 310). However, appellant did not himself represent the Bernsteins or any of the Eastern Service employees before the grand jury; he was directing the cover-up effort while at the same time trying to keep a low profile (A. 432):

Fayer: I have representatives, I have engaged, I'm shall we say directing things. The theory is I, we have engaged attorneys for Eastern Service Corporation.

R. Lernerstein: We, we've engaged a number of attorneys for people (inaudible).

* * * * *

R. Bernstein: It would be a conflict of interest.

Fayer: I don't want to be involved with anything that happens here. I don't want to involve Eastern Service Corporation.

* * * * *

Fayer: Even a hint.

At the time of the meeting on February 9, 1972, appellant was aware that Goodwin was an FHA appraiser (JA. 261) and that Eastern Service was a target of the grand jury investigation (J. 280). Appellant knew that there was a possibility that Goodwin might testify against the Bernsteins (JA. 286, 314). He knew that Goodwin could hurt Eastern Service if he (Goodwin) made allegations of criminal activities involving the Bernsteins (JA. 294). Appellant had never spoken to Goodwin about the FHA investigation or Goodwin's or the Bernsteins' possible criminal activities (JA. 230, 300). Appellant also knew before the February 9, 1972 meeting that the Bernsteins had offered to pay Goodwin's attorney's fees (JA. 261-262, 271, 276, 294).

B. The February 9th meeting

Appellant began the meeting with Goodwin on February 9, 1972 by acknowledging that he was aware of the meeting between Goodwin and the Bernsteins on the previous day (A. 355). At that previous meeting the Bernsteins had been unsuccessful in persuading Goodwin to state definitively that he would remain silent in connection with the grand jury investigation (see generally A. 283-354). This greatly distressed Rose Bernstein, who stated to appellant at one point in the February 9, 1972 meeting (A. 396):

I didn't know he was doing this Al. I told him to sit tight and do nothing.

Appellant was also greatly concerned about the "danger" to the Bernsteins and Eastern Service if Goodwin went voluntarily before the grand jury (JA. 263). Appellant was aware that as to white collar crimes it is very difficult to establish a case unless one of the participants cooperates with the government (JA. 310). Hence, appellant went to the meeting at the restaurant seeking to

succeed where the Bernsteins had failed—*i.e.*, to assure that Goodwin would keep quiet (A. 399-400):

Fayer: We assume that everybody sits tight

...

R. Bernstein: Nobody says anything.

Fayer: Then he doesn't have a case. Doesn't have ...

H. Bernstein: He hasn't any.

Goodwin: No?

Fayer: On the other hand ...

R. Bernstein: If somebody's gonna talk ...

Fayer: Somebody, *this is why I am here to-night. If somebody opens up, then he's got the beginnings of a case.*

Goodwin: The beginnings.

Fayer: That's right.

[Emphasis supplied.]

Or, as Harry Bernstein stated to Goodwin later in the conversation, "If you say anything, it blows everything" (A. 422). Accordingly, at the very outset of the meeting appellant's advice to Goodwin was to "say nothing" (A. 357).

Throughout this lengthy conversation appellant endeavored to influence Goodwin not to go voluntarily before the grand jury and otherwise to remain silent in connection with the grand jury investigation. He told Goodwin how several Eastern Service employees had helped thwart the ongoing investigation by invoking their Fifth Amendment privilege and otherwise remaining silent (A. 372, 376). He explained the rationale behind this tactic in an effort to convince Goodwin to follow a similar tactic (A. 376-377).

Fayer: This is why I say to everyone, this is not only you . . . Everyone is in the identical position. They're damned if they do, and they're damned if they don't. You think they're not in that same position? And this is why I save said and my advice is this to them. Refuse to testify. And this is what they did . . . Each and every one of them. Everyone did the same thing! Refuse! That was the end of it! Now, the, uh, attorney's in a position, the U.S. Attorney is in the position, he's looking for corroboration. There's no question about it. But he can't find it . . .

Appellant told Goodwin that his situation was no different than that of the others (A. 366):

This is why when they, Rose mentioned this morning, I said, invite Goodwin to sit down, because everyone's in the same boat;

He also assured Goodwin that "I'm giving you no different statement or advice now than I gave them before" (A. 359).

During portions of the February 9th meeting appellant and the Bernsteins complemented one another in endeavoring to influence Goodwin to adopt this tactic (A. 386-387):

Fayer: [A]nd they told Frank Fey,⁴ we know all about what happened to your man, so tell us the rest of it! See. Frank Fey, Frank Fey, you know Frank?

Goodwin: Uh, Huh.

Fayer: Frank, says drop dead.

⁴ Frank Fey was an employee of Eastern Service (JA. 266).

H. Bernstein: He walked out.

Fayer: He walked out.

R. Bernstein: Uh, that's right.

Fayer: Yeah.

H. Bernstein: What are you intimidating me?

Goodwin: Gutsy.

H. Bernstein: The hell with you and he walked out.

Fayer: Yeah.

Goodwin: Where, where was this at?

H. Bernstein: Up in right in the DA's office.

Fayer: In Accetta's office, the DA's office.

H. Bernstein: Where Accetta is, Accetta's office, he says what are you trying to intimidate me, entrap me?

Fayer: He says drop dead.

H. Bernstein: He walked out.

Fayer: He walked out.

H. Bernstein: Just like that.

Fayer: Uh, see he has said this and this is the standard ploy. Don't forget I said, we know, let's not kid ourselves. Uh, we have for our own benefit been keeping our fingers on the pulse of this thing.

H. Bernstein: We know just what's going on behind the scene.

Appellant also put himself forth as being fully aware of what was occurring in the investigation of FHA--related activities. He told Goodwin that he (appellant) was aware of the activities of the New York Department

of State in relation to the FHA scandal, and those people who had testified before the Department (see, *e.g.*, A. 401). Appellant indicated that he knew who had been before the grand jury (see, *e.g.*, A. 376). Finally, he stated that he knew who was talking and cooperating with the government (see, *e.g.*, A. 364, 387, 434).

With this asserted broad knowledge of the investigation, appellant endeavored to assure Goodwin that the government's investigation was getting nowhere. He constantly emphasized the weakness of the government's investigation (see, *e.g.*, A. 377, 384, 390, 400, 401, 415, 416, 417, 421, 422, 444). Appellant further argued to Goodwin that since no one else was talking, Goodwin could be "hurt" only if Goodwin himself gave information (see, *e.g.*, A. 357-58, 365, 398, 402, 403, 411, 412).

On the other hand, appellant constantly emphasized to Goodwin that if he did talk "you're gonna be let go anyway, and then you're opening other avenues for yourself" (A. 359). Aside from losing his job, the other avenues which Fayer told Goodwin he would open up by talking were financial liability to the Internal Revenue Service and criminal liability with the government (see, *e.g.*, A. 358, 359, 376, 398, 412, 446). In short, he tried to convey to Goodwin that ". . . if you do talk you're finished anyway" (A. 445).

Appellant's endeavor to influence Goodwin not to go voluntarily before the grand jury was well emphasized by his statement to Goodwin (A. 381):

This is the thing. Now the answer is here is what do you gain? And that, that's the real, that the real \$64,000 question. What do you gain? You can only lose. You can't gain.

Although appellant was well aware of the benefits one can receive by cooperating with the government (JA.

289), he never once told Goodwin that there were any benefits in cooperating and testifying voluntarily before the grand jury. Instead, appellant spent the entire meeting assuring Goodwin that no evil would befall him if he remained silent, and that he would only hurt himself if he went voluntarily before the grand jury.

Appellant emphasized at the February 9th meeting that the principal tactic was to deny everything, regardless of the truth or falsity of the allegation.⁵ For instance, the following exchange occurred with respect to

⁵ The following colloquy between the court and appellant at the trial further uncovered the "deny everything" tactic that appellant was attempting to persuade Goodwin to adopt (JA. 308-309):

The Court: . . . Then, Rose Bernstein, I take it, addresses you and says, 'Don't you think at that point Ed' meaning Goodwin, 'should have said that testimony was [not] true?' That was directed to you wasn't it? [That "testimony" referred to an alleged statement by an FBI agent to Goodwin that the FBI had "testimony" that Goodwin took money from the Bernsteins.] (A. 383, JA. 308).

The Witness: Yes.

The Court: Then you say, 'Wait. Should have said it's a lie, but, however, what's the difference?' Were you advising Goodwin to say it was a lie?

The Witness: No, that's in the past, your Honor. This refers to the time when the FBI agent had interviewed him and apparently he had been interviewed by the FBI. If he had been interviewed, I should have denied it instead of standing pat.

The Court: You hadn't asked him if it was a lie?

The Witness: No.

The Court: How did you know it was a lie?

The Witness: I assumed it was a lie.

The Court: How did you advise him to tell a man that is a lie without inquiring?

The Witness: This was in the past, your Honor. In other words, if the statement had been a lie, he should have said it's a lie.

Ortrud Kapraki, a witness who appellant and the Bernsteins knew was cooperating with the government (A. 444).

Fayer: Whatever she says, whatever she says is absolutely not true.

H. Bernstein: She's a damn liar.

Fayer: Absolutely not true.

In fact, appellant warned Goodwin that if he accused the Bernsteins of any wrongdoing, they would deny it (A. 403-404):

Fayer: I'll tell you this, as far as the Bernsteins are concerned, you're creating a lot of trouble but . . .

R. Bernstein: We're gonna deny it.

Fayer: They'll deny it.

R. Bernstein: (inaudible).

Fayer: I'll tell you right now, they'll deny it.

So,

Goodwin: Well, I'm just listening as I say there are some things I would say to them that I wouldn't say in front of you naturally.

Fayer: Naturally . . .

As an attorney, appellant attempted to give his advice greater impact by impressing Goodwin with his (appellant's) "stature in the profession" and "standing in the profession" (A. 353, 379). Goodwin mentioned that he had discussed the matter with his attorney, who was also a friend of his (A. 373, 374, 380). Goodwin told appellant and the Bernsteins that his attorney had raised the possibility of Goodwin's cooperating with the government (A. 380). Appellant did not know, and had never spoken to, Goodwin's attorney (JA. 312). Yet appellant, who

himself had had no criminal law experience in several years (JA. 304) and very little throughout his legal career (JA. 303), repeatedly attacked Goodwin's attorney as unqualified and providing Goodwin with incompetent advice (the allegedly incompetent advice being that cooperation with the government was a *possible* alternative for Goodwin to choose).

Appellant stated that he was "stunned" (A. 379, 381), "shocked" (A. 377, 380, 397, 416), and "amazed" (A. 408) at the advice given to Goodwin by the latter's attorney. Appellant further stated that Goodwin's attorney was obviously "inexperienced" (A. 377), was not "qualified" (A. 402), and had "misled" Goodwin (A. 407). Appellant tried persuading Goodwin to drop his present attorney immediately and, in effect, to give ambiguous and misleading reasons for the sudden dismissal (A. 392, 404, 408, 428, 429). Appellant and the Bernsteins also told Goodwin to tell his attorney not to do any further investigating of this matter on his own (A. 404-405, 428-429).

In return for remaining silent in connection with the grand jury investigation, the Bernsteins offered Goodwin employment with them in their Florida office in the event that Goodwin lost his job with the FHA (A. 418-419, 423-424, 443, 445-446, 449-450). Appellant indicated his awareness of and (at least) acquiescence in this offer (A. 445):

H. Bernstein: You're (sic) still work with us.

Fayer: Right. But, uh, if, you do talk you're finished anyway (A. 445).

Moreover, Goodwin was advised that he would be provided with a good criminal attorney. He had already been done with several Eastern Service employees (A. 298-299, 405, 432, 456). Appellant indicated his awareness

of and (at least) acquiescence in the offer by the Bernsteins to pay Goodwin's attorney's fees (A. 405):

Fayer: . . . the Bernsteins have told me certain things about expenses. Let's put it that way. You know about it. I do. Uh, you're not playing a game . . .

Shortly thereafter, on February 12, 1972, Harry Bernstein called Goodwin and told him to call appellant immediately (JA. 237). In Goodwin's subsequent call to appellant, appellant provided Goodwin with the name of an attorney to replace his present attorney.* Regarding attorney's fees, appellant advised Goodwin to contact Harry Bernstein and said that there would be no problem concerning attorney's fees (JA. 177).

C. Appellant's defense

Appellant took the stand in his own defense. He testified, *inter alia*, that his purpose for attending the February 9th meeting was to give legal advice to Goodwin and that his concern was protecting Goodwin (JA. 263, 303). However, he admitted that he was also concerned with protecting the Bernsteins and Eastern Service and that he was fully aware that any advice could inure to their benefit (JA. 263, 303, 310). He further testified that although he believed Goodwin to be guilty of something and the Bernsteins to be innocent, he was aware of the possibility both that Goodwin might testify against the Bernsteins (JA. 263-264, 266, 281-283, 286, 295, 307, 314) and that the Bernsteins were involved in criminal activities with Goodwin (JA. 307).

Appellant testified that he considered himself Goodwin's attorney for the purpose of the meeting (JA. 279).

* This conversation was also recorded (JA. 175-178).

However, appellant also admitted: (1) that he was told by Rose Bernstein that Goodwin didn't feel he needed an attorney at that time and just wanted some advice (JA. 262); (2) that he was aware that Goodwin was represented by another attorney (see, *e.g.*, JA. 298); (3) that he did not question or consult with Goodwin as to the underlying facts involved in the case (JA. 298); (4) that he was not going to charge a fee (JA. 264, 268, 273)⁷ and, because there would be a conflict of interest, certainly was not going to represent Goodwin, but would give Goodwin advice (JA. 264, 282, 312); (5) that Goodwin never told him that he (Goodwin) was seeking legal advice (JA. 277); and (6) that even though he was aware of the possibility that Goodwin might testify against the Bernsteins (JA. 263-264, 266, 281-283, 286, 295, 307, 314), he conducted his entire colloquy with Goodwin on February 9, 1972 in the presence of and with the aid of the Bernsteins. Appellant saw no conflict at this stage, as he was not in his view giving critical advice (JA. 282, 312-313).

Appellant further testified that he had thought Goodwin was seeking advice as to a course of conduct to pursue with the government (JA. 304). Appellant testified that his advice to Goodwin had simply been to "sit tight" until he was subpoenaed and then to consult an attorney. Appellant claimed that his purpose was only to advise Goodwin not to talk to the FBI until he was subpoenaed and got a lawyer (JA. 265, 289, 290, 305, 310). However, appellant admitted that he advised Goodwin that the tactic had been for everyone involved to claim the Fifth Amendment when subpoenaed before the grand jury (JA. 306-307). He also admitted that he was aware of

⁷ Fayer was generally of the strong belief that it was unwise for an individual to seek legal advice from an attorney without paying for it (JA. 267, A. 323).

the Bernsteins' offer to pay Goodwin's attorney's fees and to give Goodwin a job, but claimed that he believed they would be doing so only out of friendship (JA. 294, 313).

Also included in appellant's testimony at the first trial were the specific colloquies which underlie the four-count perjury indictment involved on this appeal.⁸ It should be kept in mind that all of those colloquies related to the meeting on February 9, 1972, at which the discussions outlined *supra* and recorded on the tape took place.

D. The district court's verdict

On the obstruction of justice charge, the trial judge found beyond a reasonable doubt that there was a grand jury proceeding pending in the court at the relevant time, that appellant was aware of the grand jury proceeding, that Goodwin was a "witness" in the grand jury proceeding (that is, he knew material facts and was expected to testify before the grand jury), and that appellant knew or reasonably expected Goodwin to be a "witness" (A. 580-581).⁹ The remaining factual issues relating to the essential elements of the crime were: Did appellant endeavor to influence Goodwin within the meaning of the statute? If so, did the defendant do this "corruptly"?

The United States contended that appellant endeavored to influence Goodwin to remain silent in connection with the grand jury investigation and to invoke the Fifth Amendment before the grand jury. The defense contended that appellant's advice to Goodwin related only

⁸ See footnotes 11, 13, 17, and 19, *infra*.

⁹ There was no substantial dispute as to these facts. Although the defense did contend that appellant thought Goodwin was a possible defendant, not a witness (JA. 322), the district court resolved this issue against the defendant (A. 581).

to the latter's talking with the F.B.I., not to his testifying before the grand jury. The district court resolved this factual issue against the defendant, and substantially in favor of the contention of the United States. The court did not find beyond a reasonable doubt that appellant endeavored to influence Goodwin to take the Fifth Amendment before the grand jury (A. 586). It did find beyond a reasonable doubt that Fayer endeavored to influence Goodwin not to testify voluntarily before the grand jury (A. 565, 566, 572, 576, 581, 582). the court found that this was the great danger that all were concerned with (A. 565), and that it was the legal equivalent of the Fifth Amendment contention (A. 566, 582).

The only remaining essential element of the crime was that these acts be committed corruptly, that is, with a corrupt motive. The United States contended that appellant's motive was to protect the Bernsteins and Eastern Service Corporation. The defense contended that his motive was to give legal advice to Goodwin. Again the district court resolved this factual issue substantially in favor of the United States and against the defendant. It found beyond a reasonable doubt that one of appellant's motives, clearly, was to protect the Bernsteins (A. 582-583). However, the district court indicated that it was "quite possible to find" that appellant also had as a motive the giving of legal advice "in good faith or very foolishly" to assist Goodwin as a friend of the Bernsteins; it could not find beyond a reasonable doubt that appellant did not also have this as a motive. Although the court at one point referred to this latter motive as a "subsidiary" one, it could not determine beyond a reasonable doubt that the protection of the Bernsteins was the primary motive (A. 582-583). Finally, since the court could not find that the protection of the Bernsteins was the sole motive, it acquitted appellant (A. 583-584).

The district court also acquitted appellant on the bribery and gratuity charges. On the bribery charge, al-

though the district court found that Fayer did aid and abet the Bernsteins' offer to Goodwin of a job and attorney's fees, it had a reasonable doubt whether appellant wilfully and intentionally participated in the offer (A. 562-563). On the lesser-included gratuity offense, the district court found that appellant did not aid and abet or participate in the Bernsteins' offer to Goodwin although he was present and aware of the offer.

E. The appeal

The government appealed, contending that the acquittal on the obstruction of justice charge was based on an erroneous conception of the law—that is, that the corrupt motive (to protect the Bernsteins) need not be the sole motive. Although this Court considered that the district court had very probably misconstrued the obstruction of justice statute, this Court dismissed the appeal because in its view the findings of fact were not sufficiently clear to support a conviction without additional findings on remand, which was prohibited. *United States v. Fayer*, 523 F.2d 661 (2d Cir. 1975).

2. The perjury trial

A. The Government's Case

At the perjury trial the tape recording of the February 9th meeting between the Bernsteins, Goodwin and appellant was again the main evidence (T. 1-99, *et seq.*), supplemented by the testimony of Goodwin (T. 1-88, *et seq.*). Much of Goodwin's testimony was similar to that given during the first trial (*supra*), but he did develop in more detail the circumstances surrounding the making of the statements quoted in the perjury indictment in this case.

Goodwin testified that, within the context of the meeting on February 9th, it was clear to him that when Harry Bernstein said to him, "If you say anything, it blows everything", Bernstein was worried about Goodwin's cooperating and revealing information which would implicate various persons, including the Bernsteins, in the crimes committed by employees of Eastern Service Corporation (A. 106-107) (see Count Three). Nor was there any doubt in Goodwin's mind that when appellant told him not to cooperate, that advice included not going voluntarily to testify before the grand jury as well as not cooperating with the FBI (A. 100) (see Count One).

The most important new testimony elicited from Goodwin involved his description of what was happening when appellant stated at the meeting, "Please stay out of it". At the first trial appellant had testified that he made that remark to Rose Bernstein to prevent her from telling Goodwin to have his lawyer stop investigating the case. In Count Four of the indictment in the case at bar, the grand jury alleged that the remark was directed at Goodwin to tell his attorney to stop investigating the case. At the trial, Goodwin testified that appellant was telling him to tell his attorney to stay out of the case. Goodwin knew that because appellant was speaking to him at the time appellant made the remark (A. 104-105).

B. The defense

At the perjury trial appellant again testified in his own defense (T. 2-17 through 2-202). He was the only witness presented by the defense. His testimony covered much more area in detail than in the prior trial, particularly on cross-examination. Contrary to appellant's assertions on this appeal, his testimony at the perjury trial focused on the perjury charges.

At the prior trial, Judge Weinstein stated there was insufficient evidence to make a finding either way on whether appellant had a large enough financial interest in Eastern Service Corporation to warrant his trying to silence Goodwin (A. 583). This evidence was developed, however, at the perjury trial. Appellant had been the attorney for Eastern Service Corporation for fifteen years (T. 2-69). He earned several hundred thousand dollars in gross fees from Eastern Service every year (T. 2-72, 2-73). This money accounted for almost one third of his income (T. 2-149, 150). Eastern Service was one of his largest clients, and it took him two years to recover from losing its business after the FHA scandal broke (T. 2-74). Appellant conceded that at the time of the February 9th, 1972 meeting, he feared that losing Eastern Service could have a "substantial effect" on his law business (T. 2-75).

At the time of the meeting of the 9th, appellant was well aware that an ongoing investigation was being conducted, and that the Bernsteins were possible targets of the investigation. In fact, he had "directed" the tactic of all Eastern Service employees taking the Fifth Amendment when called before the grand jury—which several had already done by February 9th (T. 2-19, 20). He also knew that the Bernsteins were concerned that Goodwin might testify against them and accuse them of bribing him (T. 2-118, 2-127, 2-94). He conceded that when he told Goodwin that he was causing a lot of trouble for the Bernsteins, he was worried about Goodwin accusing them of wrongdoing (T. 2-140).

Even though appellant steadfastly maintained he did not know that Goodwin did actually receive bribes from the Bernsteins, he conceded that he never asked Goodwin if he had actually received such bribes (T. 2-77). In fact, he never consulted Goodwin about the underlying

facts during the entire time he was giving Goodwin advice (*id.*). Despite his ignorance of the underlying facts, appellant told Goodwin he should have denied receiving bribes from the Bernsteins when the FBI queried him about the allegations of bribe giving. He never asked the Bernsteins to leave for a moment so he could talk to Goodwin alone about these matters though he admitted there was no reason why he could not have done so (T. 86, 87). Appellant's principal criticism of Goodwin's attorney was that he had given Goodwin advice without sufficient consultation, but appellant conceded that he gave Goodwin advice without any consultation at all (T. 2-83). Moreover, appellant never once advised Goodwin of the advantages of cooperation with the government, although he was aware of them (T. 2-88, 89).

Appellant next testified that he agreed with the Canon of Ethics stating that an attorney giving legal advice to a client should be free of all competing and potentially conflicting interests (T. 2-92). He testified that he felt he was free of "compromising influences and loyalty" at the February 9th meeting (T. 2-94). He was aware of a possible conflict between Goodwin and the Bernsteins but relied completely on the Bernsteins alleged statement to him denying that they had ever given bribes to anyone (T. 2-78). In view of the blatant conflict of interest situation inherent in appellant's role at the meeting of February 9th, it came as no surprise that appellant did not want anyone else to know he was giving advice to Goodwin (T. 2-96).

In addition to extensive development of new testimony related to motive and potential conflict of interest at the perjury trial, appellant also testified about each particular count in the indictment. The prosecutor also carefully questioned him regarding his understanding of the questions and answers in the testimony alleged to be perjurious (T. 2-53 through 2-67).

In testifying about Count One (see page 26, n.11, *infra*), appellant asserted that he was only trying to persuade Goodwin not to talk to the FBI. Appellant claimed he was not trying to keep Goodwin from going voluntarily before the grand jury, as charged in the indictment (T. 2-24, 2-31). He did admit being aware when he testified at the first trial that it would have been a crime corruptly to attempt to stop Goodwin from testifying before a grand jury, but that it would not have been a crime if he had attempted corruptly to persuade Goodwin not to cooperate with the FBI (T. 2-151, 152).

Appellant's own admissions demonstrated how weak his defense was on Count One. He admitted having talked to Goodwin about going before the grand jury, but when he told Goodwin to "sit tight", he never told him that advice referred only to cooperating with the FBI (T. 2-54). When appellant told Goodwin he had told everyone else to "sit tight" and that is precisely what they had done, that advice referred to those people not cooperating with the government and taking the Fifth Amendment when called before the grand jury (T. 2-156). Yet, appellant claimed that "sit tight" in the context of the advice he gave Goodwin referred only to cooperation with the FBI (*id.*). Appellant told Goodwin that he told Rose Bernstein to sit tight and not testify before the grand jury. He then told Goodwin he was giving him the same advice he gave Rose Bernstein. However, he claimed at trial that he was not referring to Goodwin not testifying before the grand jury even though that was included in "the advice" he gave Rose Bernstein (T. 2-159, 2-162, 163). Lastly, appellant was caught in an obvious contradiction in his testimony and had to concede that when he was talking to Goodwin about "going down there", the "there" referred to the grand jury. Appellant had testified moments earlier that "going down there" referred to going down to talk to the FBI (T. 2-157).

Appellant testified that as regards Count Two of the indictment (see p. 29, n.13, *infra*), he was not talking about accusations or possible accusations of the Bernsteins having bribed Goodwin when he told Goodwin the Bernsteins would not talk. Nor was Harry Bernstein talking about the Bernsteins or Goodwin or bribes when he told Goodwin "We don't know what you're talking about" (T. 2-34, 2-47, 59-60). In fact, appellant testified far more broadly that at no time during the meeting on the 9th did he think anyone was talking about the Bernsteins allegedly having paid bribes to Goodwin (T. 2-43). Although at first he testified that he had never even heard the allegation that the Bernsteins had bribed Goodwin or anyone else, he later conceded that he was aware on the 9th that the FBI was making just such allegations (Compare T. 2-34 with 2-85, 86; see also 2-123, 3-137), and that at another point in the conversation he told Goodwin that the Bernsteins would deny any allegation he made of receiving bribes from the Bernsteins (T. 2-140, 141). Moreover, although he did not realize it, appellant squarely contradicted his earlier denials in this trial and the prior trial on the very testimony alleged to be false. He admitted that "we don't know what you're talking about" referred to the Bernsteins and Goodwin (T. 2-146, 147) and bribe payments (T. 2-191) respectively.

Concerning Count Three (see p. 32, n.17, *infra*), appellant steadfastly repeated his assertion that when Harry Bernstein told Goodwin, "If you say anything, it blows everything", appellant thought "it blows everything" referred just to Goodwin's personal interest and not the interest of the Bernsteins and other Eastern Service employees (T. 2-51). Much of appellant's testimony on this point also turned on the credibility of his assertion that at the meeting of February 9th he never thought anyone was talking even about the possibility of Goodwin accusing the Bernsteins of having bribed him.

In his testimony on Count Four of the indictment (see p. 34, n.19, *infra*), appellant stated that he had been factually correct in the first trial when he testified that he had directed the comment "Please stay out of it" to Rose Bernstein and not Goodwin (T. 2-51). He testified that Rose had been interrupting him and wrongfully telling Goodwin to have his attorney stop his investigation. Therefore, appellant told her to "Please stay out of it" (T. 2-52, 53, 2-100, 2-102). The government's contention (that he had directed the remark to Goodwin to tell his attorney to stay out of any investigation) was not true, according to appellant, even though he conceded sitting mute at a later point in the conversation when the Bernsteins again attempted to persuade Goodwin to have his attorney "stay out of it" (T. 2-108, 109).

In sum, appellant at the perjury trial stood steadfastly behind his testimony at the prior trial. Despite many inconsistencies in his testimony (see, *e.g.*, prosecutor's summation T. 3-137, 138; 3-140, 141, 142), he maintained throughout his testimony that he had not made any knowingly false statements at the first trial. The jury returned a verdict of "guilty" on all four counts charged in the indictment.

ARGUMENT

POINT I

The Government Was Not Barred From Bringing The Instant Prosecution By The Doctrine Of Collateral Estoppel. Moreover, Any Claim Of Collateral Estoppel Was Waived.

Appellant contends that as a result of the judgment of acquittal and findings of fact made in a prior trial of appellant on obstruction of justice and bribery charges, the doctrine of collateral estoppel bars the instant perjury prosecution. That doctrine provides that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970).

However, as will be shown herein, the doctrine of collateral estoppel is of no avail to appellant in this case. Despite appellant's effort to distort the essential issues involved in the perjury trial and the findings made in the prior trial, none of the essential elements which the government was required to prove in the perjury trial had been determined adversely to the government in the prior trial.¹⁰ Moreover, since appellant failed to raise

¹⁰ Appellant's claim that all four perjury counts were based on testimony of appellant which was found credible by the first trier of fact or which necessarily formed the basis for the prior judgment of acquittal (App. Br., p. 22) is blatantly untrue. Appellant draws this conclusion only after a count by count distortion of the findings of fact in the prior trial and the allegations of the perjury indictment. Indeed, as will be shown, at least one of the essential elements in the perjury prosecution had been determined in the government's favor at the prior trial.

the claim of collateral estoppel prior to or during trial, the claim is waived.

1. Application of the doctrine of collateral estoppel—the essential elements of the perjury indictment

In order to vindicate a claim of collateral estoppel, appellant has the burden of establishing that the issues in question were "necessarily determined" adversely to the government in the prior trial. *United States v. Cala*, 521 F.2d 605, 608 (2d Cir. 1975); *United States v. Feinberg*, 383 F.2d 60, 71 (2d Cir. 1967). The trial court rejected appellant's post-trial claim of collateral estoppel on the ground that the issues in the perjury trial were not the same as those resolved in appellant's favor at the prior trial (A. 279-282). A careful analysis of the findings of fact in the prior trial and the essential elements in each of the four perjury counts in the subsequent trial will conclusively demonstrate that the district court was correct in its ruling.

a. Count One—The Perjury Indictment

Count One¹¹ of the perjury indictment in effect charged that appellant lied when he testified that he tried

¹¹ Count One reads as follows (A. 5-6):

1. On the 20th day of February, 1975, within the Eastern District of New York, the defendant ALFRED FAYER, while under oath as a witness in the aforesaid trial before the United States District Court for the Eastern District of New York, did knowingly make false material declarations as follows:

Q. Mr. Fayer, I refer you to page 27 of the transcript, top of the page, the second statement you made [to Goodwin]: "This is the thing. Now, the answer is here,

[Footnote continued on following page]

to persuade Goodwin not to talk to the FBI but *had not* tried to persuade him not to testify before the grand jury.¹² Specifically, the count alleges that the specified testimony was false in that appellant "was at the February 1972 conversation to, and did, endeavor to influence the witness Goodwin not to testify voluntarily before the grand jury" (A. 6).

what do you gain? And that's the real, that [sic] the real \$64,000 question. What do you gain? You can only lose. You can't gain."

Is that the advice that you gave to Goodwin concerning his testifying and cooperating with the Government, Mr. Fayer?

A. Not insofar as his testifying. Insofar as his answering any questions with the FBI, the FBI, it's my understanding they're not empowered to make any deal or negotiate with him. He had nothing to gain by saying a word to the FBI.

THE COURT: Now, at the bottom of the page then, you say, "somebody, this is why I am here tonight."

There that night to prevent Goodwin from talking?

THE WITNESS: No, sir. Goodwin had said that he was considering cooperating and this is what I was told. And my advice to him would have been not cooperate at the FBI level. That's why my feeling was he asked for the advice and that's why I was there that night. That's why I told him if he does, he is going to have the beginnings of a case.

2. The aforesaid declarations were false, as the defendant ALFRED FAYER then and there well knew and believed, in that the said Alfred Fayer was at the February 1972 conversation to, and did, endeavor to influence the witness Goodwin not to testify voluntarily before the grand jury. (Title 18, United States Code, Section 1623.)

¹² If appellant's testimony had been factually correct, appellant would not have committed a crime under the obstruction of justice statute charged. To constitute a crime the corrupt advice must relate to the grand jury, not the FBI. See *United States v. Ryan*, 455 F.2d 728, 733 (9th Cir. 1972); *United States v. Scoratow*, 137 F. Supp. 620 (W.D. Pa. 1956).

Appellant asserts that "Judge Weinstein specifically found against the government and in favor of the defendant on this point" (App. Br., p. 23). In fact, Judge Weinstein clearly found in favor of the government on this issue in the prior trial. While the court there did not find beyond a reasonable doubt that appellant endeavored to influence Goodwin to take the Fifth Amendment before the grand jury, it did find beyond a reasonable doubt that appellant endeavored to influence Goodwin not to testify voluntarily before the grand jury (A. 565, 572, 576, 581, 582).

Judge Weinstein in language that is crystal clear specifically stated:

I find beyond a reasonable doubt that the defendant [Fayer] intended and that everybody present including Goodwin, Rose Bernstein, Harry Bernstein and himself understood he was advising Mr. Goodwin not to testify voluntarily before the Grand Jury, and that this was the great danger that all of them were concerned with. (A. 565).

He was not merely advising him, don't go to the FBI, he was saying, do not testify before the Grand Jury. If you get a subpoena, then we'll get you an attorney. (A. 572).

I just made that one finding because I think it's critical. If I made that finding adverse to the Government, that would have been the end of it. Because the Government charges, the Grand Jury not Federal Bureau of Investigation. . . . (A. 576).

. . . What he [Fayer] did was attempt to as I find beyond a reasonable doubt, influence him not to go voluntarily before the grand jury (A. 582).

Thus, in squarely rejecting Fayer's testimony that his advice related only to the FBI, Judge Weinstein found that the testimony was false in the very respect alleged in Count One of the subsequent perjury indictment. Not only is Count One of the perjury indictment fully consistent with the findings in the prior trial, but the essential element that the testimony was false had been resolved in the government's favor in the prior trial. Indeed, but for the lack of mutuality in the doctrine of collateral estoppel in criminal cases, it would have applied in the government's favor on this count. Appellant's claim of collateral estoppel as to Count One is frivolous.

b. Count Two—The Perjury Indictment

Appellant claims that the falsity of the testimony with respect to Count Two ¹³ of the indictment was claimed to

¹³ Count Two reads as follows (A. 6-7):

1. On the 20th day of February, 1975, within the Eastern District of New York, the defendant ALFRED FAYER, while under oath as a witness in the aforesaid trial before the United States District Court for the Eastern District of New York, did knowingly make false material declarations as follows:

THE COURT: Then you say, "I tell you this and I can assure this. That these two [Harry and Rose Bernstein], as for as anything is concerned, will not talk."

Now, in the context, didn't that mean with respect to accusations that the Bernsteins were paying Goodwin?

THE WITNESS: No, I don't think so.

THE COURT: Weren't they talking on page, 88 and 89, about accusations or possible accusations that the Bernsteins were paying to Goodwin?

THE WITNESS: No, your Honor. I don't see that context.

THE COURT: When Harry Bernstein says at the bottom of 89, "We don't know what you are talking about." He may mean [Rose] and Harry Bernstein and by "you are" mean Goodwin.

THE WITNESS: I don't think so, your Honor.

[Footnote continued on following page]

be in his "denial of knowledge concerning the bribery relationship between the Bernsteins and Goodwin." (App. Br., p. 23). Since according to appellant the court had resolved this issue against the government in the prior trial,¹⁴ it is claimed that the doctrine of collateral estoppel bars prosecution on this count.

Once again, appellant has utterly distorted the record. In fact, the grand jury charged in Count Two that the specified testimony was false in that, contrary to appellant's denials, "Fayer and the other parties to the February 1972 conversation were discussing *accusations* and *allegations* that Harry and Rose Bernstein had paid bribes to Goodwin" (emphasis supplied) (A. 7).

There is a clear distinction between a discussion of the *fact* that the Bernsteins had paid bribes to Goodwin and a discussion of *accusations* or *allegations* that the Bernsteins had paid bribes to Goodwin. The perjury focused on the latter of these two matters. Judge Weinstein made no findings against the government on that issue (A. 559-589). Hence, the doctrine of collateral estoppel is simply not applicable.

Further, the allegation of falsity in the denial that the subject of accusations or allegations of bribe payments from the Bernsteins to Goodwin had been discussed is a significant one, and is fully consistent with Judge

2. The aforesaid declarations were false, as the defendant ALFRED FAYER then and there well knew and believed, in that the said Alfred Fayer and the other parties to the February 1972 conversation were discussing accusations and allegations that Harry and Rose Bernstein had paid bribes to Goodwin. (Title 18, United States Code, Section 1623.)

¹⁴ The court's finding in this regard and the effect thereof will be discussed *infra* in subdivision 2 of Point I. It has no bearing on Count Two, as is shown next in the text.

Weinstein's findings.¹⁵ Appellant admittedly was aware of the possibility that the Bernsteins paid bribes to Goodwin (A. 546) and that Goodwin might testify against the Bernsteins (A. 521-522, 526, 535, 553). The government contended that, in his endeavor to influence Goodwin, appellant had the motive of protecting the Bernsteins. In the context of the conversation of February 9, 1972,¹⁶ an admission by appellant that they had been discussing accusations and allegations of bribe payments by the *Bernsteins* to Goodwin would have constituted evidence of a motive on appellant's part to protect the Bernsteins. Since Judge Weinstein did find beyond a reasonable doubt that one of appellant's motives was to protect the Bernsteins (A. 570, 582-583), the allegation of falsity is fully consistent with the findings in the prior trial.

While appellant on this appeal may not have grasped the significance of the distinction, it is significant that the jury was well able to understand the distinction between the fact of bribe payments and the possibility of bribe payments. One of the jury requests while deliberating was to have read back appellant's testimony "concerning his awareness in 1972 and 1975 of the possibility of accusations that the Bernsteins were bribing Goodwin. . . ." (A. 248). Moreover, in his summation, the prosecutor emphasized that it was not necessary to determine what appellant knew for a fact about the bribes. What was important, the prosecutor emphasized, was that appellant was aware of the possibility that the Bernsteins had paid bribes to Goodwin and that Goodwin might accuse them of that crime (T. 3-43, 44).

¹⁵ At the trial below appellant squarely contradicted himself and got caught up in his own lies concerning this matter (see government's summation, T. 3-134 through T. 3-145).

¹⁶ The idea conveyed was that the Bernsteins would not admit to having received bribes from Goodwin; therefore, if Goodwin did not talk, the government would not have a case; hence both the Bernsteins and Goodwin would be safe from prosecution.

c. Count Three—The Perjury Indictment

During the course of the conversation of February 9, 1972, Harry Bernstein said to Goodwin, "If you say anything, it blows everything." (A. 68). When questioned about this statement at the prior trial, appellant testified that he understood Harry Bernstein to be referring to Bernstein's concern for Goodwin and not his concern for the Bernsteins and Eastern Service Corporation (A. 537-538). Count Three¹⁷ of the perjury indictment charges that Fayer lied when he gave this testimony.

¹⁷ Count Three reads as follows (A. 7-8):

1. On the 20th day of February, 1975, within the Eastern District of New York, the defendant ALFRED FAYER, while under oath as a witness in the aforesaid trial before the United States District Court for the Eastern District of New York, did knowingly make false material declarations as follows:

Q. Page 68 of the transcript, Mr. Fayer, down at the bottom of the page where Harry Bernstein states:

"If you say anything, it blows everything."

Were you present when that statement was made, Mr. Fayer?

A. I really don't know. I think so but I don't remember. I'm going back—I don't remember having left. I would assume I was present.

Q. Right above, where Mr. Bernstein says, "I am working behind the scenes" throughout this conversation, Mr. Fayer, throughout those statements made by Mr. Bernstein, what did you believe it to be referred to?

A. It to be referred to? One of the questions was as to how far the Grand Jury had been progressing with Eastern and naturally Harry Bernstein was speaking to everyone of the lawyers involved to find out what they knew, if anything. He was definitely working on that.

As far as, "If you say anything, it blows everything," if Goodwin says anything he would be finished.

Q. Who would be finished?

A. Goodwin.

Q. So is it your statement that Harry Bernstein was not referring to himself but referring to his respect and concern for Mr. Goodwin?

[Footnote continued on following page]

Relying again on the court's finding in the prior trial that appellant did not have knowledge of the bribery relationship between the Bernsteins and Goodwin, appellant contends that the identical issue is determinative with respect to the perjury charged in Count Three and hence collateral estoppel applies. Once again, appellant has distorted the issues involved in the perjury trial.

Count Three specifically alleges that the testimony is false in that, contrary to his denial, appellant "understood that when Harry Bernstein said in the February 1972 conversation that if Goodwin talked it would 'blow everything,' Bernstein was referring to among others Harry and Rose Bernstein and Eastern Service Corporation."¹⁸ Once again, the issue underlying this charge was whether or not appellant knew that there was a possibility (regardless of his actual belief) that the Bernsteins had bribed Goodwin and that Goodwin might testify against the Bernsteins, and whether or not appellant and Harry Bernstein acted with a motive to protect the Bernsteins. Once again, the court's findings at the prior trial

Q. Was that your understanding of what Mr. Bernstein meant?

A. Yes, that was my understanding. The Bernsteins constantly denied giving the man anything.

2. The aforesaid declarations were false, as the defendant ALFRED FAYER then and there well knew and believed, in that the said Alfred Fayer understood that when Harry Bernstein said in the February 1972 conversation that if Goodwin talked it would "blow everything", Bernstein was referring to among others Harry and Rose Bernstein and Eastern Service Corporation. (Title 18, United States Code, Section 1623.)

¹⁸ The whole tenor of the taped conversation is containment of the investigation to protect Eastern Service Corporation and its officers, agents and employees (including the Bernsteins). It is simply inconceivable that Harry Bernstein was concerned only with protecting Goodwin, or even that appellant could believe that. Yet an admission of this by appellant would have reflected adversely on the issue of his corrupt intent.

did not resolve this issue against the government by any stretch of the imagination. Indeed, in the prior trial Judge Weinstein found beyond a reasonable doubt that the "great danger" that appellant and the Bernsteins were concerned about was Goodwin's testifying before the grand jury (A. 565), and that appellant acted with a motive to protect the Bernsteins (A. 570, 582-584). Once again, then, the allegation of falsity is fully consistent with the findings in the prior trial.

d. Count Four—The Perjury Indictment

During the course of the conversation of February 9, 1972, appellant stated, "Please stay out of it. Please." (A. 404). When questioned about this statement at the prior trial, appellant testified that he had addressed the remark to Rose Bernstein (A. 538-540)—in effect, telling her to stay out of the conversation. Count Four¹⁹

¹⁹ Count Four reads as follows (A. 9-10):

1. On the 20th day of February, 1975, within the Eastern District of New York, the defendant ALFRED FAYER, while under oath as a witness in the aforesaid trial before the United States District Court for the Eastern District of New York, did knowingly make false material declarations as follows:

Q. Throughout this transcript you make numerous—in fact on numerous occasions you stated in the transcript to have his [Goodwin's] attorney stay out of the case. Do no investigating; is that right?

A. I don't recall no investigating. I certainly felt his attorney had misadvised him and should stay out of the case at that stage. No question about it.

A. Bottom of page 50, starting with Rose Bernstein:

"But tell him not to do any investigation (inaudible).

"Harry Bernstein: Don't do any investigating on his own, don't do anything. Just don't worry.

"Fayer: Please stay out of it. Please.

"Goodwin: Stay out of it.

"Fayer: At the point, the point——

"Rose Bernstein: Tell him not to do any investigating.

"Harry Bernstein: You can tell him it may be dying down.

[Footnote continued on following page]

of the perjury indictment alleges that appellant lied when he gave this testimony—that the answer was false in that appellant “was addressing the remark ‘Please stay out of it’ to Goodwin to tell his attorney that the attorney should stay out of any investigation, and was not addressing the remark to Rose Bernstein.” (A. 10).

Appellant contends that the prosecution made the same contention at the prior trial, and that it was rejected by Judge Weinstein in acquitting him. Significantly, appellant fails to cite the portion of the record where it is claimed that Judge Weinstein resolved this issue against the government (see App. Br., p. 27). While it is clear that the government did make the argument in the first trial, it is equally clear that Judge Weinstein made no finding with respect to this issue (A. 572-573; A. 559-589). Appellant’s claim of collateral estoppel as to Count Four is totally without foundation.²⁰

“Fayer: Right. Yes, but if you are subpoenaed——”

Again, on other pages and this page, Mr. Fayer, there are numerous references to having his [Goodwin’s] attorney stop an investigation. What was your purpose in offering and giving that advice to Mr. Goodwin?

* * *

Q. Whom were you addressing this remark to, Mr. Fayer?

A. “Please stay out of it” was Rose Bernstein. She had no right to tell him not to do any investigation.

2. The aforesaid declarations were false, as the defendant ALFRED FAYER then and there well knew and believed, in that the said Alfred Fayer in the February 1972 conversation was addressing the remark “Please stay out of it” to Goodwin to tell his attorney that the attorney should stay out of any investigation, and was not addressing the remark to Rose Bernstein. (Title 18, United States Code, Section 1623.)

²⁰ This may well explain why when the matter of collateral estoppel was first raised below in a post-trial motion, appellant’s trial counsel specifically stated that he was not relying on collateral estoppel as to Count Four (A. 280).

In sum, not one of the four counts on which appellant was convicted was bottomed on findings of fact determined adversely to the government at the prior trial, much less on any facts that were necessary to the ultimate factual findings of the first trial. The not so subtle innuendo running throughout appellant's brief is that the government brought this case out of spite and prosecuted it in an unsavory manner.²¹ The argument is completely undermined when one recognizes the distortion of the record contained in appellant's brief. The argument is further undermined when one recognizes that appellant was acquitted by Judge Weinstein on what this Court indicated was "very probably" an erroneous interpretation of the law as to the essential element of a "corrupt" motive (see *United States v. Fayer, supra*, 523 F.2d at 662, 663); that the findings of fact were resolved substantially in the government's favor by Judge Weinstein (see pp. 16-17, *supra*); and that the critical factual finding on the issue of a "corrupt" motive under the proper interpretation of the law had, in this Court's view, not been made and would have required additional findings on remand (which is prohibited by the double jeopardy clause) (see *United States v. Fayer, supra*, 523 F.2d at 664). These factors are strangely omitted from appellant's brief.

²¹ Indeed, in his summation below, appellant's trial counsel told the jury that the government had brought this case solely because it did not like defense attorneys giving advice not to cooperate with the government (Tr. 3-99, 100). Of course, among other things this argument completely overlooked the conflict of interest involved, the one-sided advice given to the witness Goodwin who was not a client, and the motive to protect the Bernsteins (see government's summation in response, T. 3-101). It is no surprise that the jury resoundingly rejected appellant's argument by its verdict.

Moreover, both the prosecutor (A. 13; T. 3-11-15, 54-55, 102) and the court (A. 190) emphasized to the jury that the instant trial was for perjury, not obstruction of justice.

Thus, appellant had not in fact been found not guilty in any real sense on the obstruction of justice charge. Moreover, the evidence was very strong that he had committed perjury in that trial. After a careful review of all these factors, the United States Attorney's office decided to bring the perjury prosecution.²² Under these circumstances this was surely a proper exercise of prosecutorial discretion. Indeed, it might well be said that any other decision would have resulted in a travesty of justice.

2. Application of the doctrine of collateral estoppel—evidentiary facts in the perjury trial

Relying on *United States v. Nash*, 447 F.2d 1382 (4th Cir. 1971), appellant claims that the "similarity of the evidence and issues in the two trials was in itself sufficient to warrant a reversal of the conviction." (App. Br., p. 17). We have already seen that the essential issues or ultimate facts in the perjury trial were not the same as any issues resolved adversely to the government in the prior trial. There remains for consideration whether any evidentiary facts in the perjury trial had been resolved adversely to the government in the prior trial and, if so, the effect thereof.

At the outset it should be noted that *United States v. Nash*, *supra*, is inapposite. There, in the first trial on charges of theft from the mails of a letter containing four quarters, the critical issue was whether or not the quarters which the defendant had in her possession came

²² Since there were ample grounds in the transcript and testimony for disciplinary action against appellant in the state courts (A. 559), Judge Weinstein directed the United States Attorney's office to forward the transcript and records of the trial to the appropriate disciplinary authorities (A. 580).

from the letter (as the government contended) or from a change machine (as the defendant contended). There were only these two conflicting explanations for the possession. In acquitting the defendant, the jury necessarily resolved this issue against the government. Thus, the government was barred from bringing a perjury indictment alleging that the defendant's testimony that she got the quarters from a change machine was false. In the context of that case, whether the quarters came from the letter or from the change machine was an ultimate fact in both trials and had been necessarily resolved against the government in the first trial.

Appellant contends that there were only two conflicting explanations for his presence at the meeting in February 1972, and thus asserts that the instant case is analogous to *Nash*. These conflicting explanations as to appellant's presence, according to appellant, were (App. Br., p. 24): "either he knew about the bribery relationship between his clients and Goodwin and was there to insure Goodwin's silence in order to protect the Bernsteins; or he was genuinely ignorant, as he claimed, of their guilt and was there simply to assist Goodwin by giving him legal advice." The crucial issue, then, in appellant's view was whether he was there to protect the Bernsteins or to protect Goodwin, which issue appellant asserts was resolved against the government at the prior trial.

The fallacy in appellant's position is twofold. First, there was a third possible explanation for appellant's presence at the meeting in February 1972: namely, that appellant was aware of the possibility that the Bernsteins had paid bribes to Goodwin and that Goodwin might testify against the Bernsteins, and was there to protect the Bernsteins and perhaps also to give advice to Goodwin (a crime if his motive to protect the Bernsteins in this situation was improper or "corrupt," see *United*

States v. Fayer, supra). The second fallacy in appellant's argument is the fact that Judge Weinstein resolved the crucial issue as to appellant's purpose substantially in favor of the government.

Appellant admittedly was aware of the possibility that the Bernsteins had paid bribes to Goodwin (A. 546) and that Goodwin might testify against the Bernsteins (A. 521-522, 526, 535, 553). Further, the court resolved the factual issue as to appellant's motive substantially in favor of the government. Judge Weinstein found beyond a reasonable doubt that one of appellant's motives, clearly, was to protect the Bernsteins (A. 582-583). The court also indicated that it was "quite possible to find" that appellant also had as a motive the giving of legal advice "in good faith or very foolishly" to assist Goodwin as a friend of the Bernsteins; it could not find beyond a reasonable doubt that appellant did not *also* have this as a motive. Although the court at one point referred to this latter motive as a "subsidiary" one, it could not determine beyond a reasonable doubt that the protection of the Bernsteins was the primary motive (A. 583-584). The essence of the court's finding in this regard was (A. 570):

Obviously the defendant was interested in saving the Bernsteins and the corporation, that's clear. . . . It is not clear he wasn't also trying to help the . . . prospective witness Goodwin.

Under these circumstances the instant case is clearly distinguishable from *Nash*. The government's theory at the perjury trial was fully consistent with the explanation of appellant's presence discussed above and with the court's finding of fact as to the crucial issue in the prior trial. Judge Weinstein's acquittal on the obstruction of justice charge was based on his inability to find that the motive to protect the Bernsteins was the *sole* motive (A. 582-584). Judge Weinstein also acquitted appellant on

the bribery charge. This case then might have been parallel to *Nash* if the government had charged appellant with perjury for testifying that he acted with some motive to protect Goodwin, or for testifying that he did not with criminal intent aid and abet the bribery attempt of Goodwin. But the government did not do this. Hence this perjury prosecution was not barred by collateral estoppel. See *United States v. Gugliaro*, 501 F.2d 68, 70-71 (2d Cir. 1974).

There remains for consideration whether any evidentiary facts in the perjury trial had been resolved adversely to the government in the prior trial, and if so the effect thereof. There are three separate aspects to this inquiry: (1) Was the evidentiary fact in the subsequent trial an "ultimate" fact in the prior trial? (2) Was the evidentiary fact in question "necessarily determined" against the government in the prior trial? (3) Does the doctrine of collateral estoppel apply to facts which are only evidentiary and not "ultimate" facts in the second trial? Unless all of these questions are resolved in appellant's favor, collateral estoppel is simply inapplicable.

In this regard appellant points to the findings made by Judge Weinstein in acquitting him on the bribery charge. We will discuss shortly the complex issues involved in the above-mentioned three-fold inquiry as to these findings. It should be noted, however, that there is no necessity herein to resolve these complex issues, for appellant has clearly waived any claim of collateral estoppel with respect thereto. Moreover, it may well be that appellant is not raising any claim of collateral estoppel as to evidentiary facts. While appellant does refer to the facts about to be discussed in this regard, his claim appears to be that they constituted essential elements of the perjury charges—a claim which has already been clearly refuted.

Appellant did not raise any claim of collateral estoppel either prior to or during the perjury trial, despite the fact that he was represented by the same attorney as in the prior trial. Appellant did not object to the admission of any evidence during the perjury trial, or to any arguments during summation, on the ground of collateral estoppel. The claim was first raised as part of a post-trial motion on the date of sentencing. Even then, the claim was made only with respect to Counts One through Three of the perjury indictment. No such claim was made with respect to Count Four or with respect to any evidentiary facts or summation arguments (A. 279-282).

Under these circumstances the collateral estoppel claim is deemed to have been waived. *United States v. Friedland*, 391 F.2d 378, 381 (2d Cir. 1968), *cert. denied*, 404 U.S. 867 (1971). See also *United States ex rel. Di-Giangiemo v. Regan*, 528 F.2d 1262, 1268-1270 (2d Cir. 1975), *cert. denied*, 426 U.S. 950 (1976); *United States v. Buonomo*, 441 F.2d 922, 924-25 (7th Cir.), *cert. denied*, 404 U.S. 845 (1971) (claim of double jeopardy deemed waived when first raised on motion for a new trial). Whatever may be the rigors of a waiver rule where the claim of collateral estoppel would be sufficient to secure dismissal of the indictment,²³ "a failure to plead collateral estoppel when the only result [of upholding the claim] would be the exclusion of certain items of evidence"

²³ Appellant cites *United States v. Moss*, — F.2d — (2d Cir. September 6, 1977), Slip op. 5751, 5763 to support the proposition that the claim of collateral estoppel has not been waived (App. Br., p. 28). The *Moss* case involved a waiver of immunity in the context of the Bankruptcy Act and does not purport to apply to a collateral estoppel claim. Moreover, as to Count Four it might be noted that appellant explicitly excluded it from his post-trial collateral estoppel motion, stating that "with respect to Count Four, I don't base that motion on collateral estoppel." (A 280). One could scarcely imagine a more knowing or explicit waiver.

(*United States ex rel. DiGianiemmo v. Regan*, *supra*, 528 F.2d at 1270) presents the classic situation for applying the waiver rule. See *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).

Turning to the matter of the findings concerning the bribery charges in the prior trial, the court found that the Bernsteins did offer a bribe (a job and payment of attorney's fees) to Goodwin in order to induce Goodwin not to testify. However, as to appellant the court found "a reasonable doubt based upon the testimony of the defendant himself that he truly believed the Bernsteins' innocence", and further found "a reasonable doubt as to the state of mind and intention of [appellant] although [appellant] did aid and abet the Bernsteins . . . he did not beyond a reasonable doubt do it wilfully and intentionally." (A. 562-563).

The court thus found a reasonable doubt as to two factual issues: (1) whether appellant believed the Bernsteins guilty or innocent of paying bribes to Goodwin to influence his duties as an FHA appraiser, and (2) whether appellant acted wilfully in aiding and abetting the inducement of Goodwin not to testify.

The first aspect of the three-fold collateral estoppel inquiry relates to whether either of these two facts was an "ultimate" fact in the prior trial. The second of these factual issues was clearly an ultimate fact on the charge against appellant of aiding and abetting the offer of a bribe to induce Goodwin not to testify. However, it would appear that the first of these facts was not an "ultimate" fact on this charge. For even if appellant believed that the Bernsteins had not paid bribes to Goodwin to influence his duties as an FHA appraiser, he would still be guilty of aiding and abetting the bribe offer to induce Goodwin not to testify if he participated

in the offer and acted wilfully with respect thereto. Hence it would appear that only the second of these facts is subject to the application of the doctrine of collateral estoppel.

The second aspect of the inquiry relates to whether either of these two facts was "necessarily determined" against the government in the prior trial. The second fact was "necessarily determined" against the government—it was the essential element of the charge on which the court based the acquittal.

However, there is a question as to whether the first of these facts was "necessarily determined" against the government within the meaning of the collateral estoppel doctrine. While the court did base its acquittal on the bribery charge in part on appellant's testimony that he believed the Bernsteins had not paid bribes (A. 562-563), it limited its finding to the bribery charge; the court went out of its way to state that the only finding it was making at that time relating to the obstruction of justice charge was that appellant did endeavor to influence Goodwin not to go voluntarily before the grand jury (A. 572; see also A. 564). Moreover, a week later when the court ruled on the obstruction and gratuity charges, it made no finding concerning appellant's belief in the Bernsteins' innocence (A. 579-589). On the lesser-included gratuity offense where no specific intent is required, the court found that appellant was aware of but did not aid or abet or participate in the bribe offer (A. 586), contradicting its earlier finding on the bribery charge that the defendant did "aid and abet the Bernsteins" although not with the requisite specific intent (A. 563).

On the obstruction charge, the court found a motive to protect the Bernsteins and would have found appellant guilty if the "whole thing were set up to protect the Bernsteins," but acquitted because it had a reasonable

doubt as to whether appellant may *also* have had a motive to protect Goodwin (A. 583-584). Its findings were, to say the least, contradictory and in this Court's view not at all clear (see *United States v. Fayer, supra*, 523 F.2d at 664). Of course, a failure by appellant to meet his burden of establishing that the factual issue was "necessarily determined" against the government must result in a denial of his collateral estoppel claim. *United States v. King*, — F.2d — (2d Cir. Oct. 7, 1977), Slip op. 65, 67-68.

The final inquiry relates to whether either of these two facts constituted evidentiary facts in the perjury trial and, if so, whether the doctrine of collateral estoppel applies to evidentiary facts (as opposed to ultimate facts) in a subsequent trial. There is a serious doubt as to whether the doctrine is applicable to evidentiary facts in a later trial. In *Yates v. United States*, 354 U.S. 298, 338 (1957), the Supreme Court said:

The normal rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in the subsequent proceeding. So far as merely evidentiary or 'mediate' facts are concerned, the doctrine of collateral estoppel is inoperative. *The Evergreens v. Nunan*, 2d Cir., 141 F.2d 927, 152 A.L.R. 1187; Restatement, Judgments § 68, comment p... ²⁴

But see *United States v. Kramer*, 289 F.2d 909, 915-918 (2d Cir. 1961). Moreover, these two facts referred to by appellant played a minimal role, if any, in the perjury trial.

²⁴ This rule makes sense. For as an "ultimate" fact in a prior trial, the government has the burden of proving it beyond a reasonable doubt. As an evidentiary fact and not an essential element of the crime charged in a subsequent trial, the government need not prove it beyond a reasonable doubt.

Contrary to appellant's argument concerning the second of these two facts in question (App. Br., pp. 20-21), the prosecutor did not attempt to reargue the bribery charge against appellant. Judge Weinstein had found a reasonable doubt as to whether appellant aided and abetted and participated in the bribe offer with the requisite criminal intent. The prosecutor did not argue to the contrary. Rather, as appellant points out, the prosecutor argued in summation that appellant *acquiesced* in the offer to Goodwin of a job in Florida to induce him not to testify (A. 182). This is fully consistent with Judge Weinstein's finding that appellant was "aware" of the offer (A. 586).²⁵ It is clear that appellant did nothing to prevent the offer, but mere acquiescence is not the participation required to constitute a criminal act.

The first of the two facts here in question played a minimal role in the perjury trial. Appellant contends that the government sought to relitigate the issue of his knowledge and belief as to whether the Bernsteins paid bribes to Goodwin in his capacity as an FHA appraiser (App. Br., pp. 20, 24).²⁶ The prosecutor did raise the question in his summation—stating both that appellant

²⁵ The Bernsteins had offered Goodwin a job with them in the event that Goodwin refused to talk and lost his job with the FHA (see, e.g., A. 418-419, 423-424, 443, 445-446, 449-450). When Harry Bernstein said that Goodwin would work for them in this event, appellant said "*Right*. But, uh, if you do talk you're finished anyway" (Emphasis supplied) (A. 445). This Court further indicated on the prior appeal that the facts included appellant's having "indicated approval of the Bernsteins' offer to Goodwin to work in their Florida office in the event that Goodwin lost his FHA job." *United States v. Fayer, supra*, 523 F.2d at 662.

²⁶ We have already seen that this factual issue was very probably not an "ultimate" fact in the prior trial, and that it is not clear that the issue was "necessarily determined" against the government within the meaning of the collateral estoppel doctrine.

denied having such knowledge, and that there was strong evidence pointing the other way (A. 176-181; T. 3-38 through 3-43). However, the prosecutor emphasized that it was not necessary in deciding the perjury charges to resolve the factual issue as to whether or not appellant knew or believed that the Bernsteins had paid bribes to Goodwin (A. 181; T. 3-43). What was important in this regard, the prosecutor emphasized, was that appellant (as he had to and did admit) was aware of the possibility that the Bernsteins paid bribes to Goodwin and that Goodwin might testify against them (T. 3-43, 3-44).

Based on this three-fold inquiry, it would appear that no evidentiary facts were utilized in the perjury trial in contravention of the principles of collateral estoppel. In any case, as previously noted, appellant has waived any claim in this regard.

POINT II

The Background Evidence Concerning The Relationship Between Goodwin And The Bernsteins Was Properly Admitted Into Evidence.

Appellant claims it was reversible error for the court to allow Goodwin to testify briefly about his bribe relationship with the Bernsteins concerning his duties as an FHA appraiser. In addition, appellant claims it was error to allow into evidence conversations, including the tape of February 8th, 1972, during which the Bernsteins attempted to persuade Goodwin not to cooperate with the government. While appellant contends that this evidence was hearsay, it will be shown that the evidence was admissible on a number of grounds: 1) as general background information; 2) as background to explain the motive and intent of the Bernsteins in the conversations recorded on the tape of the February 9, 1972 meeting between Goodwin, appellant and the Bernsteins; and 3)

as evidence of appellant's knowledge of the prior conversations in which the Bernsteins endeavored to influence Goodwin not to cooperate, since they were specifically alluded to by appellant on the tape of February 9, 1972.

The government offered the testimony of Goodwin about his bribe relationship with the Bernsteins as background information without which the jury could never have fully understood what was occurring at the critical meeting of February 9, 1972; Goodwin's testimony on this point illuminated both the relationship between the Bernsteins and Goodwin, and the motive and intent of the Bernsteins at that meeting (A. 46). In his summation the prosecutor reviewed this brief testimony and then stated, "that's the background of the relationship between Goodwin and the Bernsteins" (A. 167). The court also pointed out that this testimony showed a history of bribery which definitely related to the February 9th tape (A. 47). It is proper to admit into evidence such background facts and information even if it does not directly involve the defendant, *United States v. Ruggiero*, 472 F.2d 599, 607 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); and it was proper to admit such evidence here to show the intent of the Bernsteins at the February 9th meeting, *United States v. Cioffi*, 493 F.2d 1111, 1115 (2d Cir.), *cert. denied*, 419 U.S. 917 (1974); *United States v. Frank*, 494 F.2d 145, 155 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974). The court even gave appellant's trial counsel leave to move to strike the evidence if it was not sufficiently connected to the issues at trial (A. 50), but no such motion was ever made. Nor was any objection taken to the court's limiting instruction ²⁷ (A. 49-50).

²⁷ It might be noted that even if admissible evidence is premised on an inapplicable theory, there is no reversible error where no objection has been made to the limiting instruction. *United States v. Torres*, 519 F.2d 723, 727, n. 12 (2d Cir. 1975), *cert. denied*, 423 U.S. 1019 (1975).

The government offered the testimony of Goodwin concerning his conversations with the Bernsteins (including the tape of February 8th) in which they attempted to persuade him not to cooperate, on two grounds. The first ground was again to show the motive and intent of the Bernsteins in the taped conversation of February 9th (A. 68). This evidence was relevant for, in order to establish appellant's understanding of what the Bernsteins were saying on February 9th, it was first necessary to show what the Bernsteins themselves meant by their words (A. 72-73). As already shown above (*Cioffi* and *Frank*), the case law is clear that this is a proper ground for admission.²⁸ The court thus properly ruled that this testimony was admissible (see, *e.g.*, A. 68). The prosecutor emphasized this function of the evidence in summation (A. 172). Moreover, the court had properly charged the jury in this regard (see, *e.g.*, A. 63):

This defendant cannot be chargeable with conversations out of his presence. And I am allowing it only to show the history of the relationship between the witness and the Bernsteins. . . .

The government also offered the testimony of these prior conversations concerning the Bernsteins' endeavor to influence Goodwin not to cooperate, on the ground that appellant was aware of the substance of the conversations (A. 68). The court also admitted the testimony on this ground (see, *e.g.*, A. 71). The court charged the jury as to this ground that the evidence was not admissible unless it was connected to appellant, and shown that ap-

²⁸ In *United States v. Frank*, *supra*, 494 F.2d at 155, this Court noted: "No matter how often appellate courts and commentators seek to explicate the true nature of the [hearsay] rule, the notion that any reference to a conversation constitutes hearsay, inadmissible unless within an exception, dies exceedingly hard."

pellant was aware of the particular conversation (see, *e.g.*, A. 63). Again, appellant made no objection to the limiting instructions, and did not later move to strike on the ground that it had not been connected to him, as he had been given permission to do (A. 50).

There is a compelling basis for allowing into evidence the tape of February 8th and related Goodwin testimony on this ground. On the tape of February 8th, appellant directly alluded to being informed about the prior conversations. The court specifically gave this as one basis for allowing the tape of the 8th and related testimony into evidence (A. 91-92). Appellant made all of the following statements on the tape of the 9th which clearly show his knowledge of the earlier conversations:

"Rose has mentioned to me this morning uh, what you had said to her yesterday" (A. 355).

". . . when . . . Rose mentioned this this morning, I said, invite Goodwin to sit down, because everybody's in the same boat" (A. 366).

". . . the Bernsteins have told me certain things about expenses.²⁰ Let's put it that way. You know about it. I do" (A. 405).

Appellant also had a remarkable knowledge of information that had been discussed only between the Bernsteins and Goodwin. For instance, on the tape of the 9th, Goodwin did not mention that his attorney told him to consider the possibility of cooperating with the government until midway through the conversation (A. 380). Yet, several times prior to Goodwin's ever mentioning

²⁰ The "expenses" referred to the Bernsteins' offer on the 8th to pay Goodwin's attorney's fees. Nobody had mentioned anything about the "expenses" on the 9th prior to appellant's mentioning that he knew about the offer.

his attorney's advice, appellant talked to Goodwin about that advice (see A. 377, 379). It does not take a great leap of faith to discern where appellant found out about Goodwin's possible course of action.

In view of the explicit references on the tape of the 9th to the conversations occurring prior to that meeting, it is difficult to understand how appellant could argue with the court's statement that the jury could infer that the Bernsteins told appellant about the substance of the prior conversations (A. 68-69).

In addition to the specific references on the tape of the 9th to earlier conversations between the Bernsteins and Goodwin, the court pointed out (outside the presence of the jury) that appellant was the Bernsteins' personal lawyer and had constantly bragged on the tape about how he was keeping his finger on the "pulse" of everything that was occurring relating to the FHA investigation (A. 66). Later, the court stated that according to his own words, appellant was "directing" everyone . . . "he indicates a complete knowledge of everything that is going on" (A. 69).

Even appellant appears to concede that if he had knowledge of the substance of the contested prior conversations, they were properly allowed into evidence (App. Br., p. 43). Appellant cannot deny that there were pregnant references to earlier conversations by him on the tape of the 9th but states:

"As a matter of simple logic, it does not necessarily follow that because there are references to prior conversations in a subsequent one, that everything that was said in the former was passed on" (App. Br., p. 43).

It may be that it does not "necessarily" follow that the substance of everything was passed on, but it could well follow. In any event, as the court stated, what and how

much was passed on was a question to be left for the jury to decide using its common sense and experience (A. 70-71).

Appellant also disputes that a reasonable man could infer that the Bernsteins' attorney and close advisor (*i.e.*, appellant) was told by them of the prior conversations. Appellant states that "this thesis of admissibility is inconsistent with the contents of the conversation. In the conversation, Harry Bernstein says: 'Ed [Goodwin], not even your attorney should know these things'" (App. Br., p. 36). What appellant fails to point out is that the warning obviously did not extend to appellant. In the conversation of February 9th, Harry Bernstein reminded Goodwin not to open up to his attorney (A. 433-434). But both Harry and Rose Bernstein assured and encouraged Goodwin to talk to appellant (A. 431). In fact, when they repeated later that Goodwin could feel safe in talking to appellant, appellant chimed in, "He knows that" (A. 448). Moreover, appellant's constant bragging about directing things would make the inference that the Bernsteins told appellant the substance of their prior conversations with Goodwin very probable and not at all "inconsistent" with the taped conversations as appellant asserts.

Appellant correctly asserts that the prosecutor in his summation drew the striking parallels between the advice the Bernsteins gave Goodwin on the 8th and the advice appellant gave him on the 9th. In fact, the words and phrases used were practically identical at times (see App. Br., p. 41). Appellant alleges that these coincidental similarities served unfairly to tie appellant to the Bernsteins' clear admonitions to Goodwin on the 8th not to go before the Grand Jury:

"Although Fayer's advice was substantially different, as Judge Weinstein found, the distinction was one the jury would ordinarily not grasp" (App. Br., p. 39).

In fact, as pointed out previously (see Point I), Judge Weinstein found that the advice to Goodwin on that point was substantially identical—both the Bernsteins and appellant were telling him not to go before the grand jury, as that was the “great danger” they were all concerned with. Hence, the parallels drawn by the prosecutor between the discussion of the 8th and 9th were legitimate and were not barred by the prior findings of Judge Weinstein.³⁰ (see Point I, *supra*).

In sum, the contested evidence was admissible on any of a number of grounds.³¹ The probative value of the evidence was great, and there was no unfair prejudice to appellant demonstrated.³²

³⁰ After discussing these parallels, the prosecutor told the jury that it was not necessary in deciding the perjury charges to resolve the question as to how much the Bernsteins had told appellant of the prior conversations (A. 181).

³¹ As appellant notes, the court indicated that there was yet another basis on which the evidence could have been admitted—an agency theory based on a conspiracy or joint criminal enterprise to obstruct justice (A. 110-111). We need not discuss this basis, as the jury was never instructed on it. However, contrary to appellant's claim that this theory was “startling” since appellant had been acquitted on the substantive charge of obstructing justice (App. Br., p. 41), it should be noted that: (1) the acquittal was based on an erroneous conception of the law, not on any factual finding adverse to the government (see *Point 1, supra*); and (2) there may be occasions where the co-conspirator or co-actor evidentiary rules will apply even where there is not enough evidence to let the conspiracy count go to the jury, *United States v. Stanchich*, 550 F.2d 1294, 1299 (2d Cir. 1977).

³² It is perhaps noteworthy that the jury's entire focus appeared to be on the tape of February 9th since they asked to have several sections of it played but never once asked to hear the tape of February 8th played (A. 239-243, 245).

POINT III**It Was Not Error, Let Alone Reversible Error, To Allow Goodwin To Testify To His Understanding Of Some Statements Made During The February 9th Meeting.**

Appellant asserts that it was reversible error for the court to allow Goodwin to testify to his understanding of some statements on the tape made to him by appellant and Harry Bernstein (see, *e.g.*, A. 100, 104-105, 106-107, 108-109). However, this Court in the past has refused to deem such a procedure to be error, let alone reversible error, even where the appellate court itself could understand the words without any difficulty. *United States v. Cioffi, supra*, 493 F.2d at 1116. In the case at bar, the participants did not talk in code, but their language was clearly guarded, and its interpretation depended to some extent on a knowledge of the industry in general and Eastern Service Corporation in specific.³³ Goodwin's understanding of the few phrases he was called upon to explain were, as the prosecutor pointed out at trial, admissible as being "helpful to a clear understanding of his testimony or the determination of a fact in issue." Federal Rules of Evidence, Rule 701(b) (T. 2-3, 4, 5).

The issues in Count One and Count Four and in part Count Two involved a determination as to what appellant meant by certain words; the issues in Count Three and in part Count Two involved a determination as to what appellant understood the Bernsteins to mean by certain words. As to the latter issues, in order for the jury to de-

³³ Appellant argues that the conversations were not in veiled terms, but that he spoke clearly. This argument overlooks the fact that appellant claimed the words had one meaning and the grand jury, prosecutor, and petit jury found they had an exactly opposite meaning.

termine what appellant thought the Bernsteins meant, it was first imperative to determine what in fact they did mean. Or, as the court put it (T. 1-75, 76):

But in order to prove what Fayer knew or what his understanding was as to what the Bernsteins meant, we must also understand what the Bernsteins meant by it.

* * * * *

But certainly in order for there to be proof of what you understand I meant, there should be proof in the record as to what I meant in the first instance.

As to both categories of issues, Goodwin was the person spoken to. Hence, as the court pointed out, Goodwin's understanding 'if reasonable' was a factor to be considered though it was not binding on the jury, much as a mail fraud victim's interpretation of a sales pitch and a bank robbery victim's testimony about the fear he felt is helpful though not binding (A. 94, 95, 98). See, *e.g.*, *Phillips v. United States*, 356 F.2d 297, 308-309 (9th Cir. 1965) (mail fraud); *Shale v. United States*, 388 F.2d 616, 618 (5th Cir.), *cert. denied*, 393 U.S. 984 (1968) (mail fraud). *Cole v. United States*, 327 F.2d 360, 361 (9th Cir. 1964) (bank robbery).

It should also be noted that the trial court was always careful to give a correct limiting instruction when Goodwin interpreted someone else's remarks. For instance, at one point in the trial after such testimony the court told the jury (T. 1-116):

Now, I want the jury to understand it's not what Mr. Goodwin understood Mr. Fayer to say. The issue in the case is whether Mr. Fayer intended to tell Mr. Goodwin not to appear before the Grand Jury

The court then told the jury he let Goodwin testify to what he thought appellant meant because if the jury found Goodwin's interpretation was reasonable, it was some evidence of what appellant meant (*id.*). The court was always careful to admonish the jury that it was what appellant meant that controlled in the final analysis (T. 1-123). It would appear to be beyond cavil that if Goodwin reasonably thought appellant was attempting to persuade him not to go before the grand jury, that "interpretation" was a relevant factor the jury should consider in determining what, in fact, appellant did mean:

A declarant obviously intends that his statement to a witness be understood; it is hardly improper to allow the witness to state what was understood. *United States v. Brooks*, 473 F.2d 817, 818 (9th Cir. 1973).

In support of his position, appellant cites the case of *DeLoach v. United States*, 307 F.2d 653 (D.C. Cir. 1962) (App. Br., p. 47).³⁴ However, in *DeLoach* the problem was that the witness merely testified that certain parties "agreed" to do various things without stating the actual words that led him to conclude an agreement had been reached. In addition, the witness in that case did not even identify the person making the various statements, choosing instead to lump the defendant with the others by using the term "they." Unlike *DeLoach*, in the case at bar, the jury had a tape and transcript of the actual statements upon which Goodwin based his interpretations.

³⁴ In *United States v. Levy*, 138 F.2d 429 (7th Cir. 1943), cert. denied, 321 U.S. 770 (1944), cited by appellant (App. Br., p. 47), the court stated that the recipient of a letter, plain on its face, should not have been allowed to say what the letter's statements meant to him. Nonetheless the court concluded that "the defendants could not have been harmed by its admission." (*Id.* at 432).

On the other hand, the jury in *DeLoach* could exercise no such independent judgment because they had no idea what the witness' conclusions were based on.

Appellant claims he was prejudiced in part by Goodwin's "interpretations" because his testimony on those points was directly contrary to what Judge Weinstein had found at the first trial (App. Br., p. 48). But nowhere does appellant establish that Goodwin's interpretations directly contradicted Judge Weinstein's findings at the prior trial. Appellant does claim that Goodwin's interpretation of the phrase by appellant to him that "these two [the Bernsteins] as far as anything is concerned will not talk" (A. 108) was barred by Judge Weinstein's findings of fact (App. Br., pp. 46-47):

Although there seemed to be no doubt as to the meaning of the statement, Goodwin testified that Mr. Fayer was referring to Goodwin's having received bribes from the Bernsteins (A. 108) despite the fact that Judge Weinstein had expressly found to the contrary (A. 562-563, 579).

Judge Weinstein made no finding of fact about the meaning of that statement by appellant.³⁵ And he did not even impliedly make a ruling about what that statement meant to Goodwin.

Furthermore, as with any interpretation by Goodwin, the jury was free to give his interpretation what value it thought it deserved. Goodwin was subject to cross-examination and attack during summation. Moreover, it hardly even required a limiting instruction to inform the jury that Goodwin's interpretation did not control their

³⁵ Appellant again fails to draw the distinction between the fact of bribe payments and possible accusations or allegations of bribe payments (see Point 1, *supra*, at pp. 29-31).

determination on appellant's intent. Finally, while the jury during deliberations asked to hear the tape of the conversation a number of times, it never once asked for or heard any rereading of the testimony of Goodwin concerning his understanding of the meaning of the critical words (A. 238-278).

POINT IV

Appellant Was Not Denied Any Rights And Was Not Unfairly Prejudiced When The Prosecutor Informed The Jury During His Summation That He Heard A Word On The Tape Recording That Was Different From The Word On The Transcript.

During the course of the conversation of February 9, 1972, Rose Bernstein told Goodwin to tell his attorney not to do any investigation. Appellant then made a remark which appeared in the transcript as "Please stay out of it. Please." (A. 404). When questioned about the remark at the prior trial, appellant answered that "Please stay out of it" was addressed to Rose Bernstein because she had no right to tell Goodwin's attorney not to do any investigation (A. 539-540). Count Four of the perjury indictment charges that appellant lied when he gave this answer. The grand jury charged, in essence, that appellant knew the remark was in fact directed to Goodwin in an effort to have him tell his attorney not to do any investigating, and that appellant nevertheless gave the materially false answer.

During the three-day interval between the close of the evidence and summations, the prosecutor noticed that what was said in the tape was not "Please stay out of it. Please" but rather "Please stay out of it, completely." In his summation he informed the jury of what he had heard and invited them to listen to the tape to make a

determination for themselves (A. 182a). Appellant's trial counsel argued in his summation that the word was "please", not "completely" (A. 3-94), but during jury deliberations he also realized (as he then conceded) that the word on the tape was "completely" rather than "please." (A. 276; A. 518). That the mistake in the transcript was an innocent one is underlined by the fact that neither appellant nor his counsel nor the court nor the prosecutor detected the correct word until after two trials.

Appellant now claims that the prosecutor's mentioning the discovery of the error in his summation amounted to an impermissible alteration of the indictment, and, more importantly, a denial of appellant's right to confrontation (App. Br., p. 50).

Appellant's argument that the prosecutor altered the indictment is difficult to discern. The indictment was in no way amended. The court read the count of the indictment as it was voted by the grand jury to the petit jury in its charge. (A. 216-218) The question as set forth in the indictment did refer to the remark as "Please stay out of it. Please", but the question itself was to whom did appellant address the remark. Significantly, in his answer appellant referred to the remark as "Please stay out of it"—without using the next word, whether it be "please" or "completely." Significantly, the grand jury, in charging that the answer was perjurious, also referred to the remark as "Please stay out of it"—again without using the next word, whether it be "please" or "completely." The answer was alleged to be false in that appellant was addressing the remark "to Goodwin to tell his attorney that the attorney should stay out of any investigation, and was not addressing the remark to Rose Bernstein." (A. 9-10).

Thus, not only did the reference in summation to the final word in the remark as "completely" instead of

"please" not change the import of the question or of appellant's answer, but also appellant's *answer* to the question and the grand jury's *allegation of falsity* did not refer to the final word at all (whether it be "please" or "completely").

Under these circumstances the change in the final word as it appeared in the transcript was simply an evidentiary matter and did not constitute an amendment to the indictment. Indeed, this is precisely what the district court held when the issue was raised at trial (A. 278):

The point is "completely" may just be evidence that he uttered the words "Please stay out of it", and he directed it to Goodwin. And that doesn't change the nature of the charge at all.

Moreover, the court had properly charged the jury that the tapes constituted the evidence and the transcript was only a guide.³⁶ (A. 195). So, the court properly reasoned, any change in the transcript would be up to the jury after hearing the tape (A. 182b). The change, if the jury chose to make one, was entirely evidentiary.

It is equally difficult to discern how appellant was denied his right to confrontation by the prosecutor's action. Appellant notes that the substituted word made it clearer that, as the government alleged, appellant was addressing the remark to Goodwin and not to Rose Bernstein (App. Br., p. 52). Appellant's trial counsel also stated that now that he heard the word "completely" rather than "please," the entire statement was "more

³⁶ The stipulation as to the accuracy of the transcript laid the foundation for its use by the jury as a *guide*. It did not preclude argument by either side if a particular variance between the tape and the transcript was discovered (see *e.g.*, T. 1-37, 38; A. 182b).

logically addressed to Goodwin." (A. 277). Appellant concedes, in effect, that appellant made a false statement but claims he was misled by the mistranscription of one word.

It is important to keep in mind that what is central to a false statement prosecution is not any particular word or wording, but the specific information that the questioner was attempting to elicit from the defendant, as understood by the defendant, *United States v. Alberti*, — F.2d — (2d Cir. August 24, 1977), Slip op. 5505, 5518. A perjury conviction may not be voided by quibbling over words if the defendant clearly understood the import and meaning of the question, and nevertheless gave a false answer. See *United States v. Bonacorsa*, 528 F.2d 1218, 1221 (2d Cir.), *cert. denied*, 426 U.S. 935 (1976).

The government does not quarrel with, and indeed emphatically agrees with, appellant's citation of *United States v. Chapin*, 515 F.2d 1274, 1280 (D.C. Cir.), *cert. denied*, 423 U.S. 1015 (1975), for the proposition that the essence of the crime of perjury is that the question as the defendant understood it was falsely answered (see App. Br., p. 55). The import of the question here was clearly whether appellant was telling Rose Bernstein to stop inveighing Goodwin to tell his lawyer to stop investigating or was, in fact, joining with Rose Bernstein in so telling Goodwin. There can be no doubt that appellant well understood the chasm that separated these varying interpretations—a chasm made no smaller by the substitution of the word "completely" for "please" in the remark referred to by the question.

Appellant claims that his recollection might have been altered had he seen the "correct" word on the transcript (App. Br., p. 53). It may be that appellant's *answer* would have been altered had he seen the correct word,

but there is no reason to believe his *recollection* and *state of mind* would have been altered. In short, he may have fashioned a more believable answer but there can be no doubt that at both trials he was testifying from a clear memory and not from a memory jogged by a transcript, and that he *knowingly* gave a false answer.

Alternatively, appellant claims that fairness mandated an opportunity to explain at the perjury trial "that his prior testimony was based on his understanding that the statement was 'Please stay out of it, please'" (App. Br., p. 54). However, this is what occurred. As appellant notes (App. Br., p. 54), this was the understanding shared by everyone, including the prosecution, during the testimony at the perjury trial. Indeed, even after the prosecutor raised the point in his summation, appellant's counsel argued to the jury that the word was "please," not "completely" (T. 3-94). Appellant's counsel further argued that when appellant testified, he was testifying as to the meaning of "Please stay out of it, please," not the meaning of "Please stay out of it completely." (A. 3-94, 95). Appellant's claimed understanding was thus clear to the jury.

More importantly, the prosecutor in his summation (T. 3-54) and the court in its charge (A. 209-210, 219) emphasized to the jury that it was appellant's understanding of the questions which was critical. The court charged the jury (A. 209-210):

The defendant may not be found guilty of perjury simply because he gives testimony which is factually incorrect. He may have given incorrect testimony because of surprise, confusion, haste, inadvertence, honest mistake as to the facts, carelessness or negligence. . . . you may not find him guilty unless you find beyond a reasonable doubt that the giving of false testimony was wilful and that the other elements of the offense are present.

The Government must prove beyond a reasonable doubt that the statements under oath were made voluntarily and intentionally, and it must prove beyond a reasonable doubt that the defendant understood the questions as propounded to him, and that he was aware that the answers to the questions were untrue, and that he nevertheless, deliberately and intentionally gave false answers to the questions. The Government must prove the false testimony was not given because of surprise, confusion, haste, inadvertence and honest mistake as to the facts, carelessness or negligence.

As the court said in *United States v. Chapin, supra*, 515 F.2d at 1280, cited by appellant, "the possibility that a question or an answer may have a number of interpretations does not invalidate either an indictment or a conviction after a jury charge which, as here, requires the jury to determine that the question *as the defendant understood it* was falsely answered in order to convict."

Finally, concerning any claim of misunderstanding, it should be noted that at the second trial appellant was facing charges for lying about this very statement. He certainly must have focused on the events surrounding that statement before the trial commenced. After all, as appellant himself asserts, had he realized his error, he could have defended at the second trial by stating he had been led astray by the mistranscription at the first trial (App. Br., p. 54). Significantly, an examination of appellant's testimony at the second trial concerning the previous remark in question will show that such testimony was just as crystal clear and unshakeable as at the first trial.

Appellant testified that he told Rose Bernstein to "stay out of it" because she had been interrupting him and

trying to give advice to Goodwin (T. 2-51, 2-52). He later reiterated several times that the remark was directed to Rose to stop her from interrupting (T. 2-100, 2-102). Even when confronted with a portion of the transcript where appellant said "right" after the Bernsteins again tell Goodwin to tell his attorney to stop investigating, appellant denied he was telling Goodwin to tell his attorney to stop investigating. Appellant said his statement "right" referred again to telling the Bernsteins to "stay out of it" (T. 2-103, 2-105). At no point in his testimony at either trial did appellant say he had a hazy memory either of what happened or to whom he was addressing the remark. Even at the second trial, after what must have been a long reflection, he stuck steadfastly to the assertion that he was trying to stop Rose and Harry Bernstein from interfering and not Goodwin's attorney from investigating.

The evidentiary change of a word from "please" to "completely" only further helped to demonstrate that appellant's allegedly clear and unbending statements as to what occurred were false and appellant knew them to be false when he made them. But by no stretch of the imagination could the "change" have somehow made appellant, mistakenly believe that he had been trying to stop Rose and Harry Bernstein from their attempt to persuade Goodwin to tell his attorney to do no more investigating.

POINT V**Appellant's False Statement As Charged In Count Four Of The Indictment Was Material.**

Appellant asserts that even if he knowingly made a false statement when he testified that his remark "Please stay out of it" was directed to Rose Bernstein and not Goodwin, the falsity was not legally material (App. Br., p. 59).

The government has the burden of establishing materiality in a false statement case. *United States v. Mancuso*, 485 F.2d 275 (2d Cir. 1973). Materiality is a legal question to be decided by the court. *United States v. Doulin*, 538 F.2d 466, 470 (2d Cir.), *cert. denied*, 429 U.S. 895 (1976). The test of materiality is whether the testimony in question was capable of influencing the factfinder on the issues before it. *United States v. Gugliaro, supra*, 501 F.2d at 71. In the case at bar, the trial court had no trouble finding that the testimony alleged to be false in all four counts, including Count Four, was material (T. 2-147). The court was clearly correct in its ruling.

Appellant correctly asserts that in the first trial appellant admitted that he repeatedly told Goodwin to drop his attorney and get a new attorney (App. Br., p. 59). However, appellant leaps from that premise to the assertion that appellant's remarks to Goodwin to get rid of his attorney were tantamount to a statement to Goodwin to tell his attorney not to do any more investigating. Therefore, it is argued by appellant, he effectively admitted the substantive import of the remark in question (*i.e.*, that he had told Goodwin to stop his lawyer from doing further investigation), and the false statement concerning to whom he addressed the remark was inconsequential (App. Br., p. 60).

The government agrees that the person to whom appellant addressed the remark is important only as evi-

dence of what he was trying to do (see Point IV, *supra*). However, as the prosecutor stated in his summation, there is a great distinction between telling someone to drop an attorney and telling someone to tell his attorney to stop investigating the matter (T. 3-115).

What appellant repeatedly admitted at the first trial was telling Goodwin to drop his attorney. What he did not admit at the first trial was telling Goodwin to tell his attorney to stop investigating. In fact, appellant testified that he told Goodwin to drop his attorney precisely because the attorney had not conducted an adequate investigation. As appellant himself testified at the perjury trial: "The duty of an attorney is to go into facts to ascertain precisely what happened . . ." (T. 2-27). Thus, an admission by appellant that he had told Goodwin to tell his attorney not to conduct an investigation would surely have been damaging on the issue of a corrupt motive.

At the prior trial, appellant even testified that the reason he allegedly told Rose Bernstein "to stay out of it" was because she was telling Goodwin to tell his attorney not to do any investigating and "she had no right to tell him not to do any investigating" (JA. 300). At the second trial, appellant was confronted with the fact that later in the February 9th meeting, the Bernsteins again harangued Goodwin to stop his attorney from investigating, but this time appellant remained silent. Appellant replied at the trial that he still thought it was wrong of the Bernsteins to tell Goodwin to get his attorney to "stay out of it", but this time he had just failed to tell them so. (T. 2-108). Therefore, by appellant's own testimony at both trials, he concedes, in effect, that even after he and the Bernsteins told Goodwin several times to drop his lawyer, it was quite a different and much more "corrupt" matter to persuade Goodwin to tell his attorney not to do any more investigating. The materiality of the testimony, then, becomes clear.

Appellant states in his brief that the knowingly false statement that he never told Goodwin to tell his lawyer to stop investigating was not material to any of the purposes of the trial spelled out in the introductory portion of the indictment (A. 4-5) (App. Br., p. 61). However, when viewed in the context of appellant's assertion that he counseled Goodwin to obtain another lawyer because his present one had not conducted the proper investigation, it is evident that appellant's false testimony was not only capable of having, but indeed did have, a very material effect on the determination of whether he was "corruptly" influencing Goodwin not to go before the grand jury (See A. 4, ¶ 2(b)). If appellant was present primarily to help Goodwin, he never would have told him to stop his lawyer from investigating further when this was the precise shortcoming in Goodwin's lawyer appellant had complained about. Appellant was well aware that his telling Goodwin to stop his lawyer from investigating any further flew directly in the face of his entire testimony, including his claimed altruistic motive for coming to the meeting (*i.e.*, to help Goodwin). And that is precisely why appellant chose to lie rather than admit the truth of the matter embraced by Count Four.

CONCLUSION

The judgment of conviction should be affirmed.

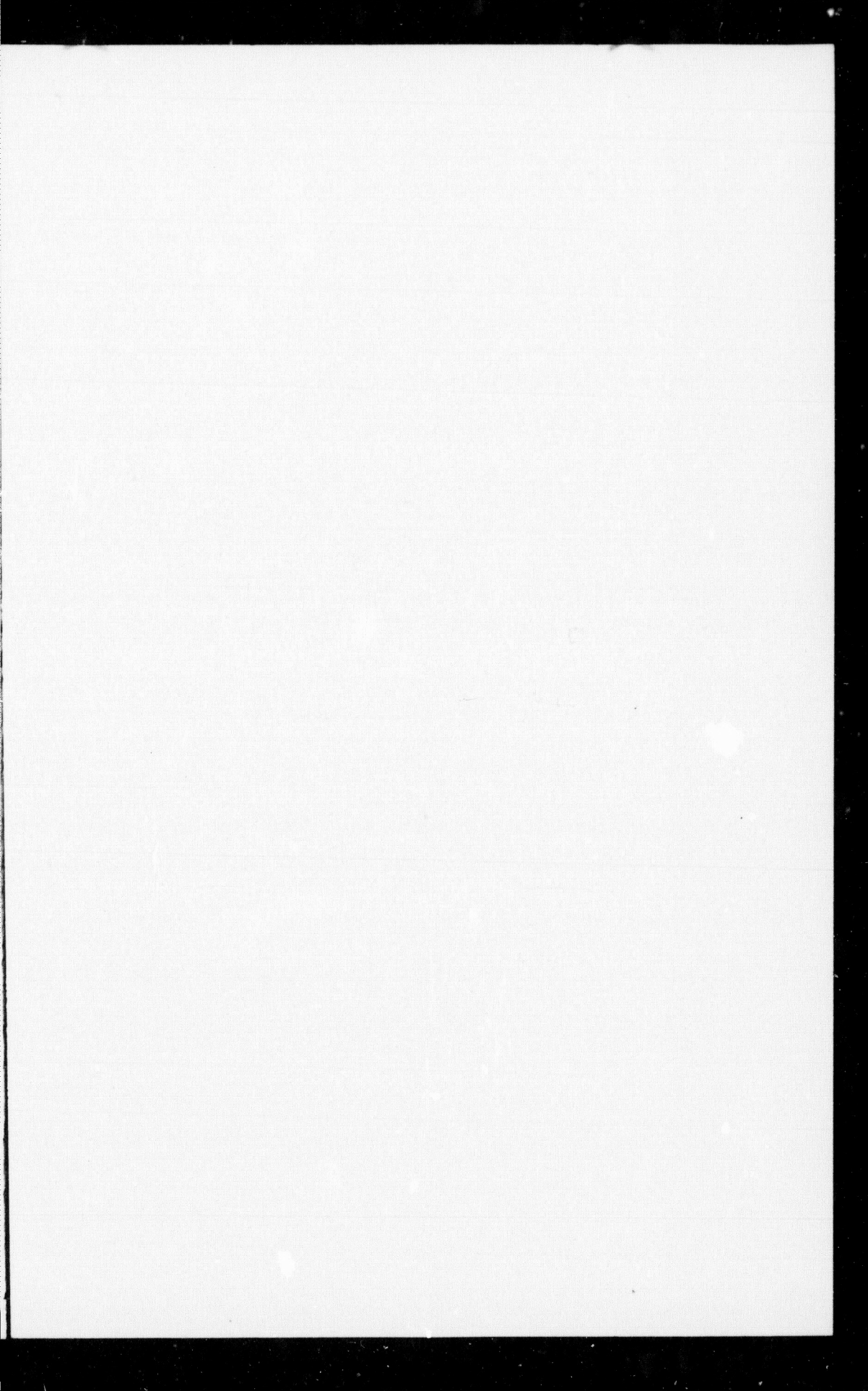
Dated: Brooklyn, New York
November 28, 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

David Gould

being duly sworn,
deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 1st day of November 1977 he served a copy of the within
Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Otto Obermaier

1290 Avenue of Americas

New York, N.Y. 10019

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County
of Kings, City of New York.

David Gould

Sworn to before me this

1st day of December 1977

Barbara A. Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-6646824
Qualified in Kings County
Commission Expires March 30, 1979

